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A Comparative Study of the Bill of Rights in the Constitution of Japan and America

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by

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P r e f a c e .

The essay which follows is the graduating thesis of the author.

His first duty is to return his best thanks and acknowledgement of indebtedness to Professors Burdick and Tyler, of the University, for their material assistance in preparing this essay. To the former gentleman, he is deeply indebted for the practical suggestions as to the plan of the undertaking, but to the latter, he owes a debt of a somewhat different nature.

His lectures before the School of Law, on American Constitutional History, and his vast knowledge of the subject have been a guide in prosecuting this work; and the sources of the material he furnished in the course,

have been of great assistance in the preperation of the essay.

The author has also received great help from his native pamphlets and documents, but has not cited any of these authorities for the reason that they are not accessible to the American reader.

In regard to the scope of the following pages, perhaps a few remarks of apology are due.

As the title of the work will explain, he had in view a comparison of the Bill of Rights in the two Constitutions, but the difficulty of the task arose in the very difference of the nature of the institution of the government of those two countries, and furthermore, he labored under the disadvantage of having no predecessors upon this subject.

He examined Merrill on Comparative Jurisprudence, Dicey's Law of the Constitution, Story on Conflict of Law, W. Wilson on State, and Williams' Roman Law, illustrated by English law, for the model of the style of the essay, and finally adopted Wilson's mode in some measure, while Merrill's was also a great help.

He does not claim to be an expounder of any new or novel theory in interpreting the Constitution, but he will consider himself amply rewarded, if he has succeeded in bringing before the learned readers, the fundemental spirits and value of this great political gift from His Majesty, and in comparing them to those gifts endowed by Providence, which this great Nation beholds.

Before the comparison of those two Bills, he has given a short account of the events which led to the pro-

mulgation of the Constitution of Japan, but omitted that of America for the two following reasons: First, American readers are fully aware of it, and repitition is unnecessary; second, the scope of the subject does not necessitate its account.

Thus, he trusts, there is no doubt as to the interest of the subject; but he only regrets that the exposition on this topic has not devolved upon one more competent, with more leisure at hand, and a profounder knowledge of modern theory of constitutionalism.

M. N.

The eleventh of February, 1889, is a memorable day in the annals of the political history of Japan.

This is the birth-day and the day of conquest of liberty in Japan after her twenty-six centuries of undisturbed sway of monarchism, absolute in its despotism, feudalism elaborate in its organization; and perhaps it is no easy task at the present day to find a counterpart of the history of her people in carrying the banner of triumph of liberty in such a peaceful manner.

Indeed we have seen many changes of the most startling character in Europe during the last few decades. The restoration of Italy as a sovereign power, with the downfall of the Pope's temporal rule, the collapse and

the utter ruin of the first military rule in England, and the equally sudden and unanticipated resuscitation of the German Empire under the control of Prussia, the territories of the latter increased by the disembarkment of France, are all events of such transcendent magnitude and importance, that all other changes in the destiny of nations beyond the limits of Europe may well be dwarfed into comparative insignificance in our eyes; but the recent changes and reforms in Japan are too serious to be ignored by those events. It has been said by a Western writer that the actual condition and the recent history of Japan present some of the most startling phenomona recorded any where in authentic annals of the human race. In this marvelous country, he continues, a few years have been sufficient for effecting changes such as

have elsewhere required many centuries; and even the best informed of the strangers in whose presence those changes have actually been wrought, were loud in their expressions of astonishment. (28 Fort. Rev. 417.)

Of late, however, there has been forthcoming a charge that Japan has been adopting the Western mechanisms, and even the theory of government, too soon, without knowing how to put them in motion, but the charge is unfounded and is the result of mere visionary speculation, as will appear as we proceed.

No doubt, it is reasonable for foreigners to question how a nation like Japan, which has been under the same form of government, ruled by a single line of royal prerogatives for nearly twenty-six centuries, can cast off the old and change to a new at a time prescribed;

or, as was well said, how can such an ancient country as Japan, nursed by"Asiatic despotism, based on Paganism and propped on a fiction" adapt and realize the fruit of labor of the civilized nations for many centuries, and degenerate into a free and constitutional monarchy in one day.

Thus questioned, we must necessarily go back a quarter of a century, in order to find the seeds of which the Constitution as we behold it to-day, is a blossom.

Upon the Restoration, after bitter struggles for the distraction of the Tycoon Dynasty, which ended in 1868, His Majesty issued the first Imperial Proclamation, by which he showed what his future policy would be, and it is remarkable to note how the spirits of representative government took root in the politics of Japan, even

in the midst of those troublesome events.

This is known as a Proclamation of five clauses:

I. By means of general consultation, the National affairs shall be determined according to public opinion.

II. Uniting the hearts of rulers and subjects in harmony, the government of the Empire shall be carried on by their co-operative work.

III. From both the civil and military officers down to the common people, all shall freely accomplish their desires and objects, so that no one shall become weary of his life.

IV. Breaking through the old corrupt state of things, we shall follow universal justice and reason.

V. Obtaining knowledge throughout the world, we shall strive in every way to strengthen the foundation of the

Empire.

From this time forward, it became the duty for "both the civil and the military officers, down to the common people, uniting the hearts of the rulers and subjects into one harmony" to "break through the old corrupt state of things, obtaining knowledge throughout the world" to the end of "strengthening the foundation of the Empire;" and the actual movements have taken place, thus sending statesmen, scholars, traders and mechanics to foreign countries, by public and private undertaking, to learn the civilized countries, while the government and people at home were busy breaking through the old corrupt state of things, and finding room for the application of the new that were to be brought home from abroad.

To do away with many things that were suited to the Nation for centuries, however corrupt they were, is, of course, no easy task; and particularly the cultivation of ideas in the public minds that, "the government exists for the people, and not the people for the government," was most important of all.

Since 1873, when the first political party in the Empire was formed by Count Itakaki, and a petition presented from the party praying for the National Assembly, as proclaimed and declared by His Majesty upon his ascendency to the throne in 1868, the politics of Japan began to claim National attention, and two years later the Leader's resignation from the Government made the political excitement still greater. Thus in 1875, the second Proclamation was issued by the Emperor. This document

is noteworthy for the conservatism and orderly progress which His Majesty had in view; and this is remarkable for another thing in our political history, for a deliberative assembly with legislative functions has come into existence.

The document says, "At the time of our accession to the Imperial Throne, we issued a promulgation, in which we showed how we shall act hereafter in promoting the prosperity, with the assistance of our Imperial forefathers and our subjects. However, there still remains many things to improve and reform, and this should all be done gradually.

We shall now, in accordance with the principle of the first Imperial promulgation, establish a Senate for legislative purposes, and a Supreme Court of Justice for

judicial administration. We shall also summon each year the chief officers of each local government in order to consult the general welfare of the provinces. Thus, as we shall gradually proceed toward establishing a constitutional government, all of our subjects are cautioned not to cling stubbornly to the old thing, nor to be too radical and hasty in progress and reform."

To suppose that the Count and his colleagues and the people at large were satisfied with the promulgation, is a mistake, as much as to conclude that the liberty of the English people was completely established by beheading Charles 1.; but indeed, the social clamor for a greater share in the exercise of sovereignty was such, that notwithstanding the heights of the Civil War, which more than once has threatened the National welfare, the next

promulgation became necessary.

The Government was now convinced that the time had come to fulfil the Emperor's promise of 1868 to have a National Assembly, but was cautious and conservative in their action, and, thinking that to open the Parliament with members untrained for actual sovereign legislation, is to make the House only a debating club, they responded to the people by organizing Local Assmeblies, which were made training schools for those who were to discharge higher duties in time to come. These Assemblies were empowered to discuss the local tariff questions, and could send a petition to the Central Government for their respective local interests. The member must be twenty-five years of age, paying ten dollars annual direct taxes, and must have resided three years in the district

from which he was to be elected; electors the same, but the amount of tax five dollars, and they must sign the ballots themselves.

By this time those students who were sent abroad began to come back with new ideas of organization, social and political, and cry for more radical reforms. Statesmen were fresh with what they had studied of the Western institutions, and loud in their demand for more liberal government, while traders and mechanics were equally peremptory for reforms after their studies abroad. Thus from this time forward, the reforms of all kinds had begun to be very prompt.

Under such circumstances, a reaction is always an unavoidable consequence, and particularly, the moral alarmists were busily engaged in condemnation of the

reformers and educators.

While thus the nation was engaged in breaking the old framework, the National demand for establishing a Parliament became so urgent that the Emperor now deemed it to be the highest time for another promulgation, which is the most important of all our political records and famous for the orderly and cautious spirit of reformation displayed.

This document is dated October. 12, 1881, and says, "From the time of our ascension to the throne, it is our object to restore our institutions, and finally to establish a constitutional form of government which shall be maintained to the future eternal. We have already established the Senate and the Local Assemblies, this all being done upon the principle of gradual and order-

ly progress. We think that every nation has its own peculiar social conditions, so that no one constitutional government can be taken as a model for another, without proper modifications.

As we owe, in accomplishing this great and difficult task, the sole responsibility to our imperial forefathers and our subjects, we shall take more time for the achievement of it. In this view, we shall now fix the year 23rd of Meiji (1890) as the time of establishing the National Assembly; and we charge our faithful subjects bearing our commission to make, in the meantime, all necessary preperations to that end."

The period between this eventful day and 1889 is marked with an activity displayed in our politics by the government and people to "make all necessary preparations

to that end," and the many important deeds were accomplished during this time, as the creation of the Privy Council and formation of a responsible ministry, and enactment of municipal administrative laws. But it is not our task to mention those events in detail within the limited time and defined scope of the subject, so we must hurry to our destination with only those passing remarks.

If the learned readers will observe with keen eyes those strings of the Imperial promulgation from the beginning of the present age Meiji (age of enlightened peace) down to the present day of the last promulgation, they will find not only the fact that the Government has been cautious in progress, but that the principle of compromise between the conservative and liberal parties was

invariably present on all occasions; thus the actual labor for twenty years has brought us back to "the ancient ideas of the seventh to the twelfth century," (Century Magazine, Dec., 1889, Page 231.) and expounded the laws and principles which were suspended from during the twelfth century to 1868, by an elaborate system of feudalism; thus the present Constitution affirms the fundemental principle of the whole past ages. (Const. Art. I, III, IV.)

By this Constitution, the Mikado establishes the right of the subjects, and shares with them legislative functions, and it comprises the Constitution proper, Law of the Houses, Imperial Ordinances concerning the House of Peers, Law of Election for the Members of the House of Representatives, and the Laws of Finance.

C h a p t e r I I.

Rights and Duties of Subjects:

During the duarchy, with an elaborate organization of feudalism which occupied the period between 1200 and 1868, the clans and the commoners were put on a different footing, and during this period, the "people meant chiefly the military gentry, one-ninth of the inhabitants;" Forum, Vol. VII, p. 412. Thus the right of the common people was scarcely recognized, either in public or civil affairs, but when we look behind the curtain of the twelfth century, we shall meet with entirely new aspects.

The people, according to Count Ito were called in those days "the great treasurer" of the country, and it

was customary for the Emperors in their succession to address the people, saying "--- Imperial Princes, Princes, Ministers, our different functionaries, and the Public Treasurer of the country here assembled, do you listen to our words-----"

Indeed, it is true that "in the Golden Age" of the Mikado's supreme power, from the seventh to the twelfth century, all the classes enjoyed the right of petition to the throne, and thus, in the real sense, the people had the privilege of redress and representation, and the power to influence their rulers. Forum, Vol. VII. p. 411)

Thus, with the downfall of the centralized monarchy to the hand of feudalism in the twelfth century, the expression "Great Treasurer" has disappeared, and it was not until the dawn of 1868, when the Restoration was com-

pleted, that the artificial class of people was abolished and made to stand equal before the law; and this chapter is therefore the fruit of seven centuries labor and the Bill of Rights of Japan.

Bill of Rights in the American Constitution.

The learned reader's recollection need not be called to the bitter opposition openly made in 1787 against the adoption of the Constitution, which the blessed people behold to-day, and that that objection was based principly on its deficiencies and omissions. Among the latter, the want of a Bill of Rights was dicussed and criticised with the greatest eagerness and zeal, a characteristic of American Patriots.

It was said that, "it is a fatal defect, and sufficient of itself to bring on the ruin of the Republic;"

but to this, answers were made that the Constitution itself is, as a matter of fact, a Bill of Rights, and nothing farther necessary; and that a Bill of Rights is necessary in adopting a constitution in a Monarchical country for the purpose of defining the mutual rights and duties between the governing and the governed, but in a Republic, where the will of the people constitutes the government by their immediate representatives, there can be no danger of despotism nor violation of constitutional law on the part of the agents thus chosen; again that a formal Bill of Rights beyond what is already existing is unnecessary and dangerous to future welfare.

Notwithstanding those apparently intelligent answers, the objection in the three foremost states, New York, Massachusetts and Virginia, was such that the critical

fate of the Constitution was nothing but an expected event; but the wise statesmanship of the Massachusetts convention succeeded in the adoption of the Constitution on a tacit understanding that a Bill of Rights should be proposed and acted upon in form of amendments when the new Constitution should take effect; to this the two other states acceded by a very close vote.

Thus the Congress in its very first session nobly and promptly took the duty to hand and passed a Bill of Rights, and sent it to the different states, thereby obtaining their ratification.

The Congress used the following language in the preamble to those amendments: "The convention of a number of the states having at the time of adopting the Constitution expressed a desire, in order to prevent miscon-

struction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government, will best insure the beneficial ends of its institutions."

Such is a short sketch of the Bill of Rights in the Constitution of the Union, indeed, too short for the purpose of explaining, but sufficient to call the readers recollection; but in comparing the Bill with that of the neighbors over the Pacific, it is to be noticed at first sight that there is no"subject" upon whom rights or duties are conferred or imposed, but the people who prohibit the government from infringing their rights and bind it to that duty; so it may be well said that the Bill in the American Constitution is a command of restriction, while that of Japan is a moral gift from Mikado, thus

differing in their fundamental basis. The phenomona might seem strange, but a short inquiry as to the seat where the Sovereignty resides will clear the cloud. In England, we are aware that the political fiction of sovereignty rests in the Parliament, and is called Constitutional Parliamentary Government, but with us it resides in the Emperor, while the "people" is the retainer in this country; then it will be plain that the Emperor in the exercise of his prerogatives, might grant or restrict the rights of the subject as much or as little as he deems proper, but, on the other hand, the sovereign body or the people in this country might restrict or loosen the prohibition upon the law making body as they see fit. Thus we observe that here we have three concise specimens of constitutionalism, viz., Constitutional Parliamentary

Government of England; Constitutional Monarchy of Japan, and lastly, Constitutional Democracy of the United States.

A r t i c l e X X V I I I .

"Conditions necessary for being a Japanese subject shall be determined by law."

This section is intended to distinguish a Japanese subject from an alien.

It is now an accepted rule throughout the world that one may become a citizen of a country, either by operation of law, or by treaty, and this latter is called naturalization. The General Naturalization Acts of American and European States provide three ways, first, by special laws which confer the privilege upon the individual named; second by proceedings under general laws, whereby individuals severally renounce any foreign alle-

giance, and take upon themselves the obligations of citizenship; third, by the acquisition by the state of foreign territory, with its people, who thereby become citizens of the state. Cooley Prin. Const. Law, p. 243-4.

As to what will be the requisites for becoming a Japanese subject otherwise than by natural birth, the author is unable to say, as there has notnaturalization act been passed, nor any treaty been enacted to authorize any aliens to become citizens, between foreign powers, except with the Mexican Government in 1889; and it is further to be noticed that the fact of determining the status of the subjects, to be fixed by special law, is mentioned in the article, as such status must necessarily prescribe the class of persons who are entitled to the enjoyment of civil and public rights.

The modern tendency of the civilized nations to put aliens on an equal footing with its own subjects in enjoyment of private rights will probably be observed to a certain extent in the expected Civil Code, but to comment on whether we should be liberal or conservative in so doing, is a question for political students.

The first clause of the fourteenth amendment of the American Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This paragraph was primarily intended to rest the question of citizenship of colored people in the famous case of Dred Scott vs. Sandford, 19 Howard, 393, the decision of which caused a violent excitement of pub-

lic opinion which was only ended by the great Civil War.

The article of the Japanese Constitution does not itself express a provision for naturalizing aliens, but it tacitly provides by declaring that ---"shall be determined by law," but the American Constitution recognizes two modes of acquiring citizenship, expressly, viz., first, by birth, second, by naturalization.

A mooted question arises as to the meaning of the word "citizen" used in the amendment, as distinguished from the word "subject"; but it is claimed by some writers that there is no distinction between them.

Thus, Her Majesty's Counsel, J. Mandeville Carlisle says, "The words subject and citizen have no special technical signification affixed to them by the code of public law. It is for those who seek to show that they

are not used in their primary and natural sense, to show affirmatively that they have some other more limited sense." See Report of H. Howard Her Majisty's Agent, p. 293. But Burlamaquii points out that "the subjects of a state are sometimes called citizens, and that some persons do not make any distinction between the two terms. But it is better to distinguish them. By "citizens"should be understood all those who share in all the privileges of the association, and who are properly members of the state, either by birth, or in some other manner; all others are simply inhabitants or commorant sojourners." Tome IV, Ch.71,72. Again Vattel declares "citizens are the members of the civil society, bound to enjoy the society by certain duties , and subject to this authority, they equally participate in its advantages. Inhabitants,

as distinguished from citizens, are foreigners who are permitted to establish their residence; bound by their abode in the country to the society, they are subject to the laws of the state while they remain in it, and ought to defend it, since they are protected by it, although they do not participate in all the rights of citizens. Law of Nation, Book I., Ch. XIX Sec. 212-214.

Thus the weight of authorities seems to be in favor of the distinction, but even after making this distinction, it must be kept in mind that the word "citizen" has a different legal meaning according to the circumstances.

Generally speaking, and as employed by Vattel, it may be said to mean any natural person owing allegiance to the government and protected by it. It is in this

sense that the word is used in this article, therefore, including males, females, adults and minors, and those who have the right of suffrage, as well as those who have not; so this clause of the amendment, independently as such, gives the political franchise of the government to no one; because this is a privilege which no government gives to all citizens, but to certain qualified ones. This point is accurately expressed by Attorney General Bates, that "no person in the United States ever did exercise the right of suffrage by virtue of the naked unassisted fact of citizenship. In every instance, the right depends upon some additional fact and accumulative qualification, which may as perfectly exist without as with citizenship."

Under such definition given above, and by the express

term of the amendment, it must be understood that the citizen by birth must not only be born within the United States, but he must also be subject to jurisdiction to which citizens are subjected, not any partial jurisdiction such as may co-exist with allegiance to foreign countries.

This clause, however, implies that those who though born out of the jurisdiction of the United States are the natural born citizens, if their father was an American citizen at the time.

By an act of Congress passed February 10th, 1855, it is provided that "persons heretofore born or hereafter to be born, out of the limits of the jurisdiction of the United States, whose fathers were or shall be at the time of their birth, citizens of the United States, shall be

deemed and considered, and are thereby declared to be citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers have never resided within the United States.

Article tenth of the Code Napoleon declares that every Frenchman born of a Frenchman in a foreign country is a Frenchman; a similar provision is made by the Prussian law of 1842; also Article V and on, of the revised Code of Italy declares to the same effect; thus it will be seen that much stress is placed upon the place of birth by American and European Governments, while in some cases the nationality determines the question. As to a detailed and farther inquiry on the subject, the learned reader is referred to Merrill on Comparative Jurisprudence; Morse on Citizenship, and Report of a

Commission appointed by Queen of Great Britain to in-- quire into Laws of Naturalization in Allegiance;-- Papers on Expatriation, Naturalization and Change of Allegiance; Washington, 1873.

A r t i c l e X I X .

"Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military, or any other public offices equally."

The primary object of this article is plainly visible as a result of the glorious triumph of the Restoration. Previous to the event, as could be expected under feudalism, all offices, both civil and military, belonged to family, and they were nothing but hereditary franchises for a particular portion of the nation; thus the family being everything, while the individual was

nothing, it is not strange that the family system and adoption have elaborately developed during the feudal period.

Since the overthrow of the duarchy, the toleration between the nobility and the commonalty became no more visible in the eye of the law in matters of appointment, but at the same time, the article mentions the necessity of fulfilment of qualification determined in laws or ordinances. Such qualifications are generally on account of age, sex or health, as women or young children are sometimes forbidden to do certain kinds of work, as in mines or manufactories. Again, it may be on account of professional unfitness, as a lawyer or physician failing in examination; also it may be on account of not paying taxes. Those are the conditions prescribed by the law,

and otherwise all subjects have equal rights to be appointed to civil and military offices without any discrimination.

The American Constitution has no express provision corresponding to this article except those provisions which undo the discrimination against the colored race; but even this has only a faint similarity. It may be said that the provisions respecting "the privileges and immunities of the citizens of the United States and of the several states" are analogous in that they do not permit of discrimination or abridgment, but it must be remembered that this is only a safeguard against any unfriendly legislation of one state against the citizens of another state, and, therefore, has no direct bearing.

It has been a matter of great controversy among the

American jurists, as to whether the act requiring legal and medical practitioners licenses for their profession be constitutional as impairing the obligation of contract but even this does not seem to be analogous to the article under consideration, for the present article speaks only of official appointments and nothing more. The reason of this dissimilarity is to be found in the very root of the difference of the institution and the history of the nation; but it must be remembered that many qualifications for different offices are mentioned in the American Constitution, thus describing the requisites for the offices; in this sense it may be said that it corresponds in a negative form.

A r t i c l e X X .

"Japanese subjects are amenable for service in the

army or navy, according to provisions of law."

It is a national obligation for the people to defend their own country by pledging their lives when the country is in danger; without it the nation loses its value, and it is in this that the history of any country records the deeds of the greatest heroism and patriotism.

So far as our authentic history can tell us, the organization of an army dates back to 887 A.D., when one-fourth of the young men arriving at majority were enlisted, and this system of general conscription was kept up until the "assumption of the power of the state by military families, led to the isolation of the military from the farming class, and all the military offices having been monopolized by the one class, the old conscription system was for a long time in a state of extinc-

tion."

But throughout those ages, the martial spirit of the nation flourished and the characteristic song that was always sung by the Samurai (Knights) illustrates how highly they esteemed their lords and country.

"Does my way lead me over the sea,
Let the waves entomb my corpse;
Does my destiny lead me over the mountains,
Let the grass cover my remains;
Where'er I go, I shall by my lord's side expire;
'Tis not in peace and ease that I shall die."

Even after the Restoration, the extreme love of military glory by the old Samurai class, was almost beyond ordinary conception; and thus Mr. Fukusawa, in one of his writings, made a death blow upon them, saying, "Death is a Democrat, and the Samurai who dies fighting for his country, and the servant who was slain while caught

stealing from his master, were alike dead and useless." Lanman's Leading Men of Japan, 47.

In 1871 the old military system of the seventh century was revived, and since then it was amended and improved, and at present all competent male subjects when they become of age (twenty years) are compelled to serve for the term of three years, although the actual numbers are fixed by the organization of the standing army and navy; and those between the age of seventeen and forty are classed among the militia and liable to be called upon when national danger requires.

Thus our policy is to keep the old national spirit and vigor eternally within a limited range.

Article II of the amendment of the Federal Constitution provides, "a well regulated militia being necessa-

ry to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

Here again we notice that the American Constitution provides a prohibition to infringe the "right of the people to keep and bear arms," while the sister article before us, imposes the duty to "bear arms", so to speak. The cause of the variance of the articles in their expression, while essentially analogous in their result, may be traceable to the fact that the "people" in America is the sovereign of the land and therefore have an inherent right to protect it by means of arms or otherwise, and no one has a right to take away this power, but with us the case is reversed. As we have already seen, "the Emperor is the head of the Empire, combining in himself the rights of sovereignty," etc. Const. Art. IV.

And his subjects have no right, but are under a duty of protecting their paramount lord and country.

As to the importance of militia, much need not be said. "The militia is a natural defence of a free country against sudden foreign invasions, domestic insurrection, and domestic usurpations of power by rulers."

Story on Constitution, Sec. 1897.

The acts of 3 Charles 1, 31 Charles 11, 1 William and Mary Sess. 2, c. 4, Sec. 17; 12 Anne c. 74, Sec. 5, Mutiny Act, 39-40; Vic. c. 8, Sec. 63, illustrate what were the grievances of the people on the other side of the Atlantic as to the standing army; and the American colonists bringing their experience from the Mother Country, found that something short of standing armies is essential as a moral check against the usurpation and

arbitrary power of the rulers, thus guarding the right of the people to bear arms by this amendment.

The militia is a state force until called upon by the Executive, and when thus called, the President is the Commander-in-Chief; in this latter case his power resembles that of the Emperor of Japan. Const. Art. II.

A r t i c l e X X I.

"Japanese subjects are amenable to the duty of paying taxes, according to the provisions of the law."

This article follows the last obligation, and those two obligations combined build the corner stone of the National existence. Count Ito tells us that our ancient day taxes were called "Chikara" (strength) to represent the strength of the people and "to tax" (osu)swas used "to make the people bear the burden."

In the seventh century in the reign of Emperor Ko-toku, a triple mode of collecting taxes was inaugurated and they were payable in grain or products, and since the Restoration the old system of taxation has been remodeled and at present it is approaching very nearly systematic perfection in its modeof collection.

Notwithstanding fanciful suppositions of foreigners that Japan is abundent in wealth, the actual condition is extreme in its contrast. It is almost only the custom duties which sustain the existence of any mercantile country; thus in the United States nearly all the government expenses are defrayed out of the custom duties, while in England about one-half is derived from the same source, but in Japan, owing to the ignorance of international intercourse of thirty years ago, the advantages of which

the foreign powers are the retainers, only $2,500,000. custom duties were levied, while the government expenditures exceeded $74,000,000., thus giving only one-thirteenth to the support of the government; then the rest of the amount required must necessarily fall on the internal commerce.

The census of the same year (1886) shows that over $43,000,000. from farmers and nearly $50,000,000. from "Sake" (wine) manufactories were raised, thus about four-fifths of the whole income is laid on the shoulders of those two factors. However, the last two years were marked with activity of foreign trade and prosperity of the internal commerce, and the sum total of trades with foreign countries in 1888 exceeded $100,000,000. against $70,000,000. in 1886, the government income reaching near-

ly the same amount with foreign trades, but until that world's renowned treaty be reviewed, the financial triumph in Japan shall be long delayed.

To illustrate what injustice is worked upon our country by that treaty, the following extract may be of interest: "The relation of the two countries (England and Japan) so far as their custom receipts of the latest recorded year are concerned, and the difference between the burdens imposed by each upon the other's trade, may be concisely set down as follows:

English duty on Japan's tobacco,	$2,600,000.
" " " " tea,	60,000.
	$2,660,000.
Japanese duty on all English imports,	960,000.
Gain of Eng. over that of Jap. Treas.	$1,700,000.

It is furthermore apparent, that in the same year, the sum gathered in England on Japanese goods was larger

than that secured in Japan, not only from foreign goods, but also from total collections, both on the imports and exports:--

English duty on Japanese products,	$2,660,000.
Total Japanese duty on imports,	$1,379,824.
Total Japanese duty on exports,	$ 939,564.
	$2,319,388.
Excess of English duties upon Japanese goods over total Japanese duties,	$ 340,612.

This conclusion is based upon an English tobacco duty of three shillings per pound. It has since been raised to three shillings and six pence for unmanufactured, and four shillings and four pence for manufactured tobaccos." Atlantic Monthly, 1881, p. 610.

No article corresponding to this can be found in the amendments of the Federal Constitution, nor any part of it, but it only gives power to raise taxes, to Congress. Thus the question regarding taxation in the

American Constitution should be discussed under the head of the power of Congress, instead of the Bill of Rights.

A r t i c l e X X I I .

"Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law."

"In modern days," Bagehot observes, "in civilized days, men's choice determines nearly all they do. But in early times that choice determined scarcely anything. The guiding rule was the law of status. Everybody was born to a place in the community; in that place he had to stay; in that place he found certain duties which he had to fulfil, and which were all he needed to think of.

The net of custom caught men in distinct spots and kept each where he stood."

Truly enough, our people before the Restoration were,

as we have observed, under particular status, and the clans were prohibited to change their abode from the province of one lord to another in pain of the loss of the status; and this not only being the law, but there was something stronger than the artificial law, namely, an iron custom founded upon a maxim, "A loyal vassal serves not two lords."

Thus nursed by law and custom for localism for centuries past, it is not all surprising that the people at present have so much of home love spirits and localization, that the modern tendency of immigration can haraly be perceived by the people; but by this clause the exercise of the liberty of abode and changing of the same, "Le droit d'option," as described by the continental jurists, are secured, and every person "who owes no

debt and is not guilty of crime" can leave his place of birth and enjoy equal liberty in the new place.

From the very nature of the American institutions there is no article, and there can be no need of it, which may be compared with this, except the provision guarding the security and secrecy of one's dwelling, but this will be treated in its proper place hereafter.

Article XXIII.

"No Japanese subject shall be arrested, detained, tried or punished, unless according to law."

This provision is indispensible to the free enjoyment of the rights of personal security and liberty, and it is perhaps no more than a positive affirmance of the existing law; thus it is the true function of a constitutional government that the personal liberty of the sub-

jects be respected with the highest regard, while it guard against the infringment or interference of a subject with the liberty of the co-subject, must be kept with the most constant strictness; it is provided by sections of the Code that any police or police officers arresting or imprisoning any one or treating him harshly, otherwise than in accordance with law, is liable to heavier punishment for so doing than would be a private individual. Crim. Code, 278, 279, 280. Also as to the process of trial, no case shall be brought before a police officer, but before some judicial authority; defence shall also be permitted, and trial shall be conducted openly. Any judicial or police authority that resorts to violence in order to exert confession of crime from an accused, shall be liable to specially severe punish-

ment. Crim. Code, 282. Punishment that is not in accordance with any express provisions of the law shall have no effect. Crim. Code, Sec. 2. Code Crim. Pro. 410.

Thus having briefly considered the general provisions of the Code, in regard to the personal security guaranteed by law already enacted, it may be well to review and set forth the organization and system of the courts now existing for the administration of justice in ~~this~~ our country.

The original or lowest court is Police Court on criminal side, and Justice Court in civil cases; both courts are presided over by the same judge, and have a jurisdiction over those offences committed in its jurisdiction, (Procedure, 49.) and punishable by imprisonment not exceeding ten days nor less than three days, or or by fine not exceeding one yen (dollar) and ninety-five

cents nor less than one yen; but the civil side has original jurisdiction over all controversies arising within the jurisdiction.

The next is the Court of Misdemeanor, which would somewhat correspond to the Court of Sessions in this State, and the Court of First Examination which is a Civil court and in its function may be compared with the County Court of this State. This Court of Sessions (Icall it so for convenience) has jurisdiction of misdemeanors within its jurisdictional districts,also has power to make preliminary examinations for indictment for felony as well as misdemeanor and appellate jurisdiction from the Police Court.

The County Court is presided over by the same justice as the Court of Sessions, and cases are appealable to it from the Justice Court.

Then comes the Court of Appeal, which may be compared to the Supreme Court of this State. This is also divided into civil and criminal, and cases are appealable from the County Court and the Court of Sessions respectively, and in each case, three or more judges must preside. As is a rule in civilized state, much imporatnce is put on the trial of criminals, and for this sole purpose a Criminal Circuit Court is created which, literally translated, may be called a court of Felony which opens once in every three months in Court of Sessions or the Court of Appeal, presided over by five judges who are to be appointed from among the justices of the Supreme Court or of the Court of Appeal. Its jurisdiction extends to those felonies committed within the defined jurisdiction and over those offences that are not to be tried by the

courts already mentioned. Thus, this court resembles the Oyer and Terminer in one direct respect, besides many other minor points, that is, the purpose or nature of the court.

The next, or the Court of Cassasion is the Supreme Court, or, literally translated, a Court of Great Trial. In its jurisdiction it naturally coincides with the Court of Appeals of this State and the Supreme Court of the United States. Its jurisdictions are:

I. Appellate from the Court below.

II. Over motions for new trials.

III. Questions concerning the jurisdiction of the courts below.

IV. Motions to transfer the jurisdiction of a particular court on the ground of public policy or predjudice

to the defendant.

This court is also divided into the fundamental divisions of criminal and civil, and presided over by not less than five justices appointed by the Emperor.

However, there is another court which may be properly called the High Court Extraordinary. This court is instituted for two main purposes; first, to try cases to which the Royal families are parties; second, to try high treason.

Judges are appointed by the Emperor annually, by the advise of the Minister of Justice, six from among the Senators and Attorney General of the Supreme Court, or one appointed by the Minister of Justice is the attorney for the Court; the place and the case to be tried therein are also to be decided by the Emperor by the advise of

the Minister of Justice; no appeal can be taken from the judgment of this court, except to petition to the same court for the following causes:

1. When any objection is raised against the judgment of the court given by ~~the~~ default.

11. When a petition is presented as in the cases provided by the Code, Section 436.

This section is a provision for the Supreme Court for the similar purpose; but by the clause we met, it is also made applicable to the High Court Extraordinary; it provides that petition may be presented to the same court for new trial: (a) in case where the rules of court are violated; (b) in case where the judgment is not given for the principal cause of the action presented by the parties to the suit; (c) in case when suit for new

trial is brought under the same circumstances as mentioned in section 439 of the Code.

This section is also the rule in the Supreme Court, but made applicable here. A new trial may be granted,

1. When, after the prisoner is convicted of murder, it is sufficiently proved that the supposed murdered person is or was still living at the time of the conviction, or was dead before the offence was committed.

11. When, while the defendant is being convicted, another person is also convicted for the same offence, but it is found that there is no conspiracy existing between them.

111. When proved by documents of public nature made before the alleged offence was committed that the defendant was not in the place where the offence is alleged to have been committed by him.

IV. When one who induced the defendant to commit the alleged offence is already convicted, and for the same offence of which the defendant is also convicted.

V. When proved by a document of a public nature that ~~that~~ the instruments used in prosecuting the defendant were fraudulent and mistaken.

The latter clause of the fourth amendment of the Federal Constitution is nothing but the positive affirmance of the principle of the constitutional law of England. It has been only a legal mode of arresting to make a special complaint under oath, stating the party to be arrested and the nature of the crime charged; but a practice had obtained for a long time by which issuing of a general warrant became founded until its illegality became forever settled by the famous Wilkies case.

It is perhaps this case, and that of Algernon Sidney, 9 State Trials, 817, which were tried about the same time, that led to the formation of this paragraph in the amendment. The article provides that,"---no warrant shall be issued but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Thus no warrant can be issued unless according to the provisions of the Constitution, and no person arrested except by the authority of such warrant; however, there are a few cases in which arrest may be made without a warrant, but it is incumbant upon the one who makes the arrest to show a sufficient cause to justify it.

In this respect we will observe that this provision goes into more details as to the process of arrest, com-

pared with its sister provisions which simply declare---- "shall not be arrested--- unless according to law," thus the latter simply leaves the detail to the enactment of law.

Then, next, as to the "detention" of criminals, the Congress is in the first place prohibited "to suspend a writ of Habeas Corpus, unless, when in cases of rebellion or when public safety may require it," thus giving right to the prisoners to inquire into the cause of his detention by the application of the writ; and again the article provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law---."

Thus again we will see that very much detail is presented in the American Constitution, against the simple word "detention" in the Constitution of Japan; the provisions which may be compared to the latter clause of the fourth article of the amendment have been pointed out incidentally in treating of the organization of Japanese courts.

Article fifth of the amendment is a safeguard for the accused in trying the cause, and it declares, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury,--- nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself---;" and ar-

ticle six of the amendment also provides that, "--- he be confronted with a witness against him, to have compulsory process for obtaining witnesses in his favor, and to have assistance of his counsel for his defence." Article seven is also to the same effect in trial of causes; it declares "in suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Article third of section second of the Constitution expressly provides that "the trial of all crimes, except in case of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed --;"

All those provisions determine the mode of trial and stand against the third declaration in Article twenty-three of the Bill of Rights of the Constitution of Japan or"---tried --- according to law."

We have already seen as to the due process of arrest, detention and trial, and now lastly comes, how should criminals be punished. Article eight provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;" and also the Congress is prohibited to enact "Bill of Attainder or Ex Post Facto Laws." Const. Art. 1. Sec. 9.

A detailed discussion of those provisions will be next to impossible in this short space, and must be left to themselves.

A r t i c l e X X I V .

"No Japanese subject shall be deprived of his right of being tried by the judges determined by law."

We saw in the article preceding that the subjects were protected from unlawful arrest, detention, trial and punishment, and now this article guarantees who shall administer the justice; thus this and the last article form an article for the security of persons, and therefore, those two combined will constitute the thirty-ninth clause of the Magna Charta.

Indeed, in days of old, class legislations were numerous, and the union of state and church produced the trial by ordeal. Once in those ages, Brenus, king of the Gauls, told the Romans, that the most ancient of all laws, was, that the weak must give way to the strong; and

that this was a divine law, and even the brutes obeyed it. And another of the same race of kings told Marius that Providence was always on the side of the strongest and bravest. 7 Univ. Hist., 370.

Thus the trial by ordeal was a common mode of trial in nearly all the European States and Asia, and particularly in Japan. Numb, Vol. XI., p. 31. But this article, as has already been said, is to insure impartiality, on account of rank or birth, so that the meanest as well as the high and mighty, may equally be protected by impartial justices appointed according to law, and, farthermore, the government has been careful to guard the individual rights by allowing the party to the action to transfer the case into another court of the same grade, "in case where on account of particular relations of the

defendant to the locality, or particular public opinion of the place, or by other circumstances of the case by which a reasonable fear of partiality exists." Code Crim. Pro. 454. As to the mode and function of judges the learned readers are referred to the chapter on Judiciary in the Constitution.

No express clause in the American Constitution can be found as a parallel of the one under consideration, but only describing the right of trial by jury, the writ of Habeas Corpus, etc., as we have already seen.

A r t i c l e X X V .

"Except in cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent."

That"a man's houseis his own castle" is a legal max-

im for explaining such an article as is under consider-
ation, and its meaning is, that "every man under the pro
tection of the laws may close the door of his habitation
and defend his privacy in it, not against private indi-
viduals merely, but against the officers of the law and
the State itself." Cooley's Prin. of Const. Law, p. 210.

However inviolable the sanctity of the subject's
house may be, it cannot be closed against one clothed
with legal authority as prescribed by law. The most fre-
quent cases for such an entry are; For property stolen,
and the supposed thief; for property brought into the
country in violation of the revenue laws, and the sup-
posed smuggler; for implements of gaming unlawfully
kept, and for liquors unlawfully kept for sale; besides
those there are, of course, many offences fixed by stat-

ute, but any search to obtain the evidence of an intent to com it a crime can never be legalized. Broom's Const. Law, p. 613; De Lolme Const. of Eng. Chap. 13.

From a critical study if the article it follows that an intruder is not guilty for whatever entry or search, however unlawful, if the consent of the owner had been obtained, and again, the doors of a dwelling house may be forced without a warrant, if a person committed high treason or felony, or breach of peace is known to be therein, or to oust the occupier of the house in behalf of the other who has, by a competent court, been commanded to take possession thereof.

The protection of the Constitution extends not only to the dwelling house proper, but to the store or warehouse, where one may equally keep things which concern

himself, or his family, or social secrecy.

Article Three of the amendment of the American Constitution, is that, "no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in the manner to be prescribed by law." This provision speaks for itself. However, it may seem quite strange, at first sight, that such an article had been inserted in the Constitution of this country, where the evil sought to be cured has not been practiced for a long time, and it is difficult in the next place to find out any necessity of this security in the country governed by the settled principles of law. Nevertheless, a declaration of such an important matter could never be disregarded from the experience of the colonists in their mother country.

The next amendment again provides that, "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

The meaning of this provision has already been explained.

Article XXVI.

"Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolable."

Every member of society has his own secrets which may be between his family, relatives and friends and the like, and has the right to convey the same among themselves by means of letters. This is unquestionably based upon the same principle with the inviolability of one's

dwelling.

A mooted question of constitutional law arose among the publicists, as to whether unsealed letters or postal cards are equally protected for their secrecy by this clause.

It is contended on one side, that when one sends his secrets in a manner that a man of ordinary prudence would not do under similar circumstances, namely, to send his secrets in an open letter, he thereby waives his right to the secret, and the matter ceases to be such, as soon as he puts it under the control of the post office. Still farther they advocate this position by applying the rule of waiver by the owner of a dwelling house to an intruder, as examined under the last article.

The opponents hold, that the post officers are the

agents of the sender of the matter and are under the public trust to keep the matter intrusted to them, under such qualifications, no matter in what manner it is sent. If the first rule can be adopted without any qualifications, and no provision be made, there is no room for secrecy in corresponding by telegraph; again, if the second rule be accepted as it is put, it will burden the post officers with too heavy and stringent responsibility, which almost no human intelligence is capable of bearing, on account of their vast extension of daily transactions; therefore it may be put as a practical rule, that, although all unsealed letters, as well as cards, are not presumed to contain any matter of secrecy, the post officers are not permitted to publish or communicate to another person the contents, unless by the

command of law; thus we will be able on the one hand to limit the endless application of the first theory, while on the other, it will somewhat loosen the rigidness of the second.

A care has been taken to provide for opening, examining, or destroying the letters, whether sealed or otherwise in case of criminal investigation, or in time of war, or emergencies; but again, a check is made even on those occasions, viz., only in the cases and in the manner to mentioned by law.

In the American amendments, nor any part of the Constitution, no provision corresponding to this article can be found, except a clause guarding against unlawful search or seizure of papers, as was cited under the last article, but that could hardly be said to be analogous

to the article under consideration.

A r t i c l e X X V I I .

"The right of property of every Japanese subject shall remain inviolable. Measure necessary to be taken for the public benefit shall be provided for by law."

The most conspicuous of all the occupations of mankind, next to the care of his own body, is that of the enjoyment of property, and "there is nothing which so generally strikes the imagination and engages the affection of mankind as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any individual in the Universe." Chase's Blackstone, p. 207. Indeed, so precious is the right, that Cicero said that common wealth and states

were established principly in order that men should hold what was their own.

Thus, the first clause of the article fortifies the sacredness and inviolability of private ownership, but it must not be forgotten that certain police regulations are to be observed for the peaceful enjoyment of this "natural right," for although so great is its inviolability, it is subordinate to the powers of the state and this principle has well been expressed by Shaw, Ch. J. to be "a settled principle growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property,

nor injurious to the rights of the community. All property ---- is held subject to those general regulations which are necessary to the common good and general welfare;" (Com. Wealth v. Alger, 7 Cush. 84.) and "it must of course be within the range of legislative action to define the mode and the manner in which every one may so use his own as not to injure others." Thorpe vs. Rutland & Burlington R. R. Co., 27 Vt., 149.

The second clause of the article provides room for the exercise of police power and a limitation to a voluntary misuse of property rights. Thus a state has a right to compel those who own and enjoy property within its territory to contribute certain amounts in the form of taxation; again it may force its subjects to contribute or give up certain specific property in be-

half of the public in form of eminant domain; it is needless to say that all those acts must be done in accordance with the law of the land, and to discuss the propriety of them is nothing but an absurdity. Besides those two enumerated cases, it is of course within the police power of a State to prohibit certain kinds of trade, as liquor and lottery, and the like, and the subjects have a duty to obey it.

It is perhaps of interest to the learned readers to see a short sketch of the land system in Japan from its beginning to the present day, as given by Count Ito in his commentaries. "It appears from historical records that, in remote antiquity, there were instances of private individuals voluntarily offering their land to the government; or the domains of private individuals being

confiscated by the government; of private individuals selling their lands, and claiming a price for it."

In the second year of Taikwa (646 A. D.) in the reign of Emperor Kotoku, the tendency to undue accumulation of lands by the owner was checked by the suppression of "Miyake" (land attached to public graneries) and "Tadokoro" (large domains in private ownership) and lands were parceled out among the people according to the number of members of each family, in imitation of the system which prevailed in China during the regime of the Zui (Sui) and To (Tang) dynasties. But latter on, the baleful system of manors and of domains prevailed more than ever. This state of things favored the growth of feudalism.

In the times of the Tokugawa government, the ag-

ricultural population was in most cases reduced to a state of tenantry of the feudal lords. After the Restoration in the twelfth month of the first year of Meiji (1868) a proclamation was issued, by which the land in each village was declared to be in the ownership of the farmers. In the fourth year, (1871) all the clans voluntarily offered to return their dominions to the Emperor and thus the ancient system of feudal domains was at last abolished.

In the second month of the fifth year (1872) the prohibition upon buying and selling of land was removed and title deeds for lands were issued. In the third month of the sixth year (1873), a notification as to the classification of lands was promulgated by which the land was divided into two classes, called "public lands and

private lands," but in the seventh year, (1874) the expression "private lands" was changed into "peoples lands" (Min-yu-chi). In the eighth year (1875) the names of the owners of land were inscribed upon the title deeds of lands. (In the formula of the title deeds, it was noted, that every one in the Japanese Empire, who owns lands, ought to have a title deed for the same similar to the said formula).

Among the powers forbidden to the different states by the Federal Constitution, is the power to pass any law inpairing the obligation of contracts.

This power, as it can be seen, was found to protect the contracting rights of the people and prevent the states from passing any law that tends to destroy the obligation arising from the contract. This provision, it

is said, was intended at first to do nothing but "prevent the repudiation of debts and private obligations, and disgrace, disorders, and calamities that might be expected to follow. In the construction of this provision, however, it has become one of the most important, as well as one of the most comprehensive, in the Constitution; and it has been the subject of more frequent and more extended judicial discussions than any other." Cooley's Prin. Const. Law, p. 300.

The federal powers are restricted by the fifth amendment, that "no person shall be deprived of property without due process of law; nor shall property be taken for public use without just compensation." The states are also forbidden by the fourteenth amendment, "--- Nor shall any state deprive any person of---property, with-

out due process of law." Thus the people of the United States are protected in their property rights by those constitutional castles, and nothing short of "due process of law," or "just compensation" can deprive them of those rights.

A question may be asked as to what is property, and what is intended by those clauses. The answer is plain that only such things as the law regards as property are property, and nothing more. Bentham, in his Principles of the Civil Code, Chap. VIII, happily said, "Property and law are born and must die together. Before the laws, there was no property; take away the laws, all property ceases."

As to what is meant by due process of law and just compensation, the principles have been settled and scarce

ly need any more inquiries.

A r t i c l e X X V I I I .

"Japanese subjects shall, within limits not predjudicial to peace and order, and not antagonistic to their duties and subjects, enjoy the freedom of religious belief."

Perhaps no history of any nation is free from the calamities resulting from religious toleration and belief; and therefore the Court of Inquisition is not a monopoly of Spain, nor the Star Chamber to England, but common to all natons in their primitive age.

All primitives codes of European and Asiatic nations mix divine and human rule of conduct, but "when," as Guizot observes, "societies have attained a great development, morality is no longer written in their codes.

The legislature leaves it to manners, to the influence of opinion, to the free wisdom of Man's will; it expresses only civil obligations and punishments instituted against the crimes. But between those two terms of civilization, between infancy of society and their greatest development, there is an epoch when the legislature takes possession of morality, digests it, publishes it, commands it, when the declaration of duties is considered as the mission and one of the most powerful mediums of the law." Guizot, Civ. Fr. Lec. 9.

Although the limited scope of the subject would not allow the author a detailed discussion and speculation as to how far the state can interfere with the religious conduct of its people, it will be interesting to observe how much stress was put upon Divine order by

English jurists of the highest eminence in its relation to municipal law; for instance, Coke said that all laws which are contrary to christianity cease; and Hale, "to say the religion is a cheat is to destroy the frame of society, and the Christian religion being a part of the Constitution, to say that it is an imposter, is to spaek against the laws of the land."

Our history does not record so many religious calamities as in the West, except the battle of Amakusa in the sixteenth century when 280,000. christians were killed; but when we consider the condition of the times and political motives which always attended the Christian religion of those days, as a means of territorial occupation, we can easily understand why the ruler of that time had exterminated them; thus American readers will find an au-

thority in Tytler's Elements of General History, as to what was the sole object of the Portuguese in sending Christian Missionaries to Japan, and after converting a sufficient number of inhabitants, how they manifested their primary object by making war preparation to invade the newly converted country.

Thus, it is unanimously accepted by the native historians, that if the christianity of those days was not of a semi-political nature, there would have been no such disasters, but they would have been protected by the Government, as Buddists were treated in the sixth century, when it was introduced.

Then religion in Japan, as such, on the one hand, was much advanced in its relation to the state, and, on the other, the state was curiously impartial to all sects;

so the author was very much amused to observe when the new Constitution was promulgated, that, while the people and publicists were loud in commenting on the liberty and freedom granted, and securities guaranteed, they were comparatively silent on this article; not only so, but a commentator, indeed, went so far as to say, "Therefore, judging from a comparative silence of religious persons, we will see that this article of the Constitution is not of any extraordinery interest to the Nation;" inferring from those circumstances, many people conclude that the Japanese are a non-religious people. Thus, it is said a missionary lately from Japan told Chicago missionaries that the Imperial University, with its eight thousand students, is the "hot bed of infidelity, the seat of agnostic philosophy; men who are familiar with the pages of Mills,

Spencer, Darwin and Huxley, ~~and~~ have never heard of Jesus." Again, Sagurai said, "Our countrymen have no taste for religion, and can never become religious people;" but Dr. Greene, the oldest missionary of the American board in Japan, declares confidentially as his experience, that, "the Japanese are intensely religious people."

Whatever their speculations may be, the fact that $5,000,000. were voluntarily subscribed in less than ten years by the poorest class of the population to rebuild a burned Budder temple, a few years ago, seems to fortify Dr. Greene's view. See N. Y. Sun, Oct. 8, 1889.

So, I have entered into a comparatively detailed account of Japanese people as religious people, perhaps out of the present purpose of this work. Now it is

idle to say that this article recognizes only freedom in religious belief; therefore necessarily, is confined to the mind, but when such belief is to be manifested by his acts, he must conform to the police regulations of the State, such as the mode of propagating a religion, and to the formation of religious associations and meetings; thus and thus only the proper relation of state and religion will be defined.

The first clause as to the religious equality in the Federal Constitution, provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States." Const., Art. VI. Chap. 3.

By an amendment it is declared that, "Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof." Amen. Art. 1.

It will appear that the Congress is prohibited to make any religious test as a qualification to a public office or trust, and furthermore, to make any law whatever regarding the establishment of a State Church; but all those matters are left to the individual state. By the establishment of religion is understood, "the setting up or recognition of a state church, or at least, the conferring upon one church special favors and advantages which are denied to others." Cooley's Prin. Const. Law, p. 205.

But it must not be supposed that the Constitution never recognizes the existence of religion; it simply prohibits the Congress to favor one sect to the expense of the other; and it recognizes the Christianity as the

prevailing religion, so,"the real object of the amendment" says Story, "was not to countenance, much less to advance Mahometanism, Judaism, or Infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any National ecclesiastical establishment which should give to a Hierarchy the exclusive advantage of the National Government." It will now be seen that no power is conferred to the Congress to act upon the religious belief of the people, leaving the whole matter to the State Legislature, but this alone would have been incomplete security if not followed by a declaration of the right of the free exercise of religion. "Thus, the whole power over the subject of religion is left exclusively to the State Governments, to be acted upon according to their

own sense of justice, and the State Constitution. And the Catholic, and the Protestant and Calvanist, and the Arminian, the Jew and the Infidel, may sit down at the common table of the National Councils, without any inquisition into their faith or mode of worship." Story on Const. Sec. 1879.

Article XXIX.

"Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations."

Free speeches, writings, publications and meetings are the media by which the subjects manifest the thought to promote their interests in the community; thus alone the subjects become interested in the country's affairs and advancement towards civilization. In a Monarchi-

cal country proper the sovereign's will decides the social and political questions, and necessarily limits the extent of the freedom of the subjects to criticise such will; but in a Republic, the aspect of things entirely opposes the former; in that form of government there is no particular individual will which parallels that of the monarch, but the public will or sentiment predominates. What are the organs then to set forth such a will or sentiment to the public? It can only be accomplished by not restraining the "man's natural rights" to express his ideas, and by guarding them by means of the instrumentality of the article under consideration. However, such freedom must be limited within due and proper spheres from the view of public policy. By this principle alone, the law of libel or slander, censure,

and the like, can co-exist with the article; thus the expression, "Liberty is a sacrifice of individual liberty" can be easily applied and understood. The constitutional principle of this freedom is well known, and it scarcely seems to be necessary to repeat it, but it may be of interest to the learned readers to see the condition of restraints made upon it by our law.

"In order to meet for discussing political as well as scientific questions in general, the leader or manager of the meeting must obtain permission before hand; but if they had no determined periodical date, such permission must be obtained three days prior to the meeting." Sec. 111. Act of 1881, as to Public Meeting.

"The application for the permission of the meeting must contain, first, the purpose of the meeting, second,

the place of meeting, third, the date of meeting, fourth, the names and addresses of the leader and three or more of the members of the meeting." Citations Ditto.

"Police officers are also empowered to be present at those meetings." Ditto.

"In order to publish newspapers or any periodicals, the owner thereof must obtain permission for the publication, and in case of the failure to do so, the editor, publisher and the owner, will be liable for one hundred dollars fine respectively." Sec. VI. Act as to Publication, 1881.

"If the contents of such paper will infringe any of those offences enumerated in the act, the Editor-in-Chief is punishable as principal, and the Author as accessory. Ditto.

"If the author will use a fictitious name, he is punishable by imprisonment for thirty days, and ten dollars fine;" but this section was, however, amended so that any fictitious name can be used, provided his real name is submitted with the writing, although his real name is not used in the publication. If any article tends to excite the public minds to destroy the existing government, the editor is punishable for not less than one nor more than three years imprisonment, and if such an article will really excite or cause the people to attempt to destroy, the editor is punishable equally with the offender. Section XIII. Ditto.

Those are brief outlines of the existing law, and it must here be said that, such being the restrictions, there remains a good deal to be improved in this field

of law before the subjects can express their free thought.

The second clause of the first amendment in the Federal Constitution prohibits the Congress to make any law abridging the freedom of speech or of the press. From a criticle study of the article, the very first feature noticeable and antagonistic to the sister article of the Japanese Constitution is, that the amendment does not undertake to give any freedom of press or speech, but it affirms the existence of those rights prohibiting the Congress to pass any law; thus we are led to inquire where such a right could be found; and this must have been ~~permitted~~ by Common Law, or by the statutes of the different states; the statutes, it is said, are silent upon the subject, so we must look to the Common Law.

It is an abuse of the article to suppose that one

has absolute right to speak before the public or publish writings upon any subject, without any responsibility. To allow this is to allow the people to destroy, at their pleasure, the peace, the reputation or the property, and even endanger the very existence of the National tranquility. In this loose sense, it has never existed in England; thus Prof. Dicey says, "Yet this notion, justified though it be, to a certain extent, by the habit of modern English life, is essentially false, and conceals from students the real attitude of English law towards what is called 'freedom of thought,' and is more accurately described as a 'right to the free expression of opinion.'" Dicey on the Law of Const. p. 221.

This being the true condition of English law upon the subject, it has never constituted an article of any

of her numerous Bills of Rights; but the true state of things cannot be better described than by Odgers in his work on Libel and Slander, page 12: "Our present law permits any one to say, write and publish what he pleases; but if he makes bad use of this liberty, he must be punished. If he unjustly attacks an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for misdemeanor, either by information or indictment."

Also De Lolme, who wrote just before the Constitutional Convention of America, has expressed, "The liberty of the Press, as established in England, consists in this, that neither the Court of Justice, nor any judges whatever, are authorized to take notice of writ-

ings intended for the Press, but are confined to those which are actually printed, and must, in those cases, be proceeded by the trial by jury." De Lolme Const. of England, Chap. X.

Blackstone, Kent and Story accept this rule as sound. 4 Blackstone's Com. 151; 2 Kent Com. 17; Story on Const., Sec. 1889.

Such being the principle and the present construction of the article, a question arose, whether the National Government has the power to pass any law not restraining the freedom of the Press, but punishing the licentiousness of the Press. Thus the act of the 14th of July, 1798, Chapter 91, aroused great public excitement, and the difference of opinion among the legislatures of all the different states, Congress, and the court of law,

and the act finally having been declared constitutional, it continued until March, 1801, when it died of its own limitation.

A r t i c l e X X X .

"Japanese subjects may present petitions, by observing the proper forms of respect and by complying with the rules specially provided for the same."

In the country where popular government is established, it is undoubtedly a "right" of the people to petition the government for grievances, and such right is openly recognized by their Constitution or law; thus the United States' Constitution prohibits to make a law to abridge the "right" of the people to petition; so it will be seen that the right is recognized as a natural right endowed by Providence, but in a Monarchical coun-

try, the standard of viewing it entirely differs, however widely and liberally it is recognized.

In the latter it is viewed as simply a matter of special privilege to the people by the grace of the Sovereign, and is not recognized as a right; thus it may be properly called a gift from the Emperor, as a matter of political morality; consequently the article allows petition, declaring, "may present petitions, by observing the proper form of respect" etc., but does not affirm, as the American Constitution, in a positive form.

As was predicated on a former occasion, the Japanese subjects were allowed by the Emperor to be heard their grievances; thus in the Emperor Kotoku's reign (64[illegible] 654 A.D.) a bell and box were hung out, through which they might make representations and complaints, and

until the time of the Emperor Saga (810-823 A. D.) this was continued.

Although, after the Emperor Kotoku, the practice of hanging a bell was changed, the people were heard by the Emperors, in their Court, and received decisions there, by the advise of their Ministers and Advisors of State.

It will also be seen that the petition was only to be presented to the Sovereign, but its sphere has been extended to Parliament and the government offices by this article.

The last clause of the first amendment in the Constitution of America, prohibits the Congress to make any law to abridge the "rights of the people peaceably to assemble and petition the government for a redress of

grievances."

This provision was pronounced to be unnecessary by some writers, as Justice Story, while Mr. Tucker admits the importance, but criticises the phraseology of the provision. Their conclusions result, as we saw, from the very nature of the popular government, and Story traces the provision to the Declaration of Rights in England, in 1688.

Whatever their criticisms may be, this is important, to make the people's grievances known to the Government, and in regard to the objection to its phraseology, Mr. Cooley's description of the term will ~~suddenly~~ sufficiently explain: "It is a generic term, however, and applies to all recommendations to office or public position or privilege, as well as remonstrances against them, and to appeals

of every sort, and for every purpose, made to the judgment, discretion or favor of the person or body having authority in the premises." Cooley's Prin. Const. 260.

A r t i c l e X X X l .

"The provisions contained in the present chapter shall not affect the exercise of the powers appertaining to the Emperor, in times of war or in case of a National emergency."

The preceding thirteen chapters are thus the fortifications established to protect the rights of the subjects, and nothing short of anarchy can abridge them; but inasmuch as humanity is not certain of future emergencies, it would be expedient to provide for such unseen events.

It is a principle of Constitutional government that

not only the governed are to obey the law, but the governing must also be restricted within the domain of law in discharge of their authority; thus alone the people are secure in their persons and property.

Then, in time of war or a National emergency when the ordinary laws of the land became unenforceable with all their details and delicacies, there must be something to meet the requisites of the occasion in order to secure society from anarchism. This article expressly declares the reservation of the power of the Emperor to exercise his extraordinary functions.

The rationale of this doctrine can be seen in the case of a successful general sacrificing a number of soldiers for the protection of his country, or the salvage in case of wreck; but when is this the crisis to justify

the exercise of this power, seems to depend entirely upon the will of the Emperor; it may further be noticed that the Constitution of many countries does not express this kind of provisions in any express form, but they are reserved by implication; but it now seems to be accepted among constitutional writers, that as this power is extremely delicate and apt to be misused, it is more secure and perfect to openly declare it in the Constitution or law.

The American Constitution, for instance, does not express any provision upon the subject, although the importance of it can never be doubted, as has already been seen. But Article I. Section 9, provides that "the privilege of the Habeas Corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety may require it." Thus it will appear that the

power of suspending this great privilege is provided, so the time when the exercise of this power becomes important, is a time when the Emperor can exercise his power; this would, therefore, virtually be the suspension of all the privileges guaranteed by the Constitution; thus it is said that, "the suspension of this privilege is a suspension of Magna Charta." May, Const. Hist. Chap. XI.

A question as to where this power of suspending the writ resides, has been elaborately discussed in Ex Parte Merryman, 9 Am. Law Reg. 524.

It is settled by the above case that the President has no power to suspend the writ, but it resides in the Congress; and that the Congress may in its discretion, represent this power through the Executive; in accordance

with this construction of the article, the Congress passed an act in March, 1863, authorizing President Lincoln to exercise this power.

It was said in Mc Call vs. Mc Dowell, 1 Abb. U. S. R., 212, that, "there are some things too plain for argument, and one of them is, that by the Constitution of the United States, the President has not the power to suspend the privilege of the writ, and Congress has.

The power of the President is an executive power; a power to execute the laws, and not to suspend them. The latter is a legislative function, and so far as it exists, belongs naturally, and by the force of the Constitution, to the Congress."

A r t i c l e X X X V I I .

"Each and every one of the provisions contained in

the preceding articles of the present chapter that are not in conflict with the laws or the rules and disciplin of the army and navy, shall apply to the officers and men of the army and of the navy."

This exceptional clause is made in order to explain clearly that soldiers must be excluded from those rights and liberties that are enjoyed by the people; among them, obedience is a rule and Marshall law is supreme; therefore, they are not entitled to any of those rights provided in this chapter, except those that are not in conflict with their own laws.

Notwithstanding those exclusions from their civil liberty, this is a safeguard to soldiers as to their rights and liberties, and a definition as to the scope of their authority.

The American Constitution has no express provision as to this power, because there is no standing army to which this article is intended to apply, but when the militia is called upon for actual service, there is no question but that they shall be governed by the Marshall law; thus this article, as such, has no counterpart in the American Constitution.

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